

on account of Z's youth, he was incapable of giving consent to his own death. A. has therefore abetted murder."

Likewise in this appeal I am of the opinion that the girl was "incapable of giving her consent" and that the appellant was therefore guilty of rape.

It seems that this construction must have always been adopted in India because I have been unable to trace a single case where a submission similar to that made in this appeal has been made there. I have no doubt whatever that the Advocates in India would not have been reticent to advance such a submission if they had believed that it had any chance of success.

As far as I have been able to ascertain, all commentators on the Indian Penal Code express the emphatic view, that intercourse with a girl under the age of fourteen years (subject only to the provisions of the exception) is rape in any circumstances. Thus, *Gour* in his Penal Code of India (at para. 4292. of the 5th Edition) states:—

"The clause simply declares that an act even though committed with the consent of a child then under fourteen years of age would be rape, her consent and precocity being both immaterial. The fact that such a girl can discriminate between right and wrong and had invited the accused to the act are both wholly irrelevant, for the policy of the law is to protect children of such immature age against sexual intercourse."

I can find no direct authority on the point under present consideration, but Ghose J., in *Mohiuddin v. Emperor*⁽¹⁾, approaches it very closely. In his judgment in that case he said:—

"On the charge (sic) under ss. 366 and 376 as indicated above the question of Sovana's age was very relevant. If in fact Sovana was less than 14 years of age although she had been love smitten and could write the letters referred to above, her consent to the acts referred to in ss. 366 and 376, Indian Penal Code, was in law immaterial."

The words to which I invite attention are "if in fact" and "was in law immaterial."

For the reason stated earlier in this judgment, I am of opinion that the direction of the learned trial Judge was correct and consequently I would dismiss this appeal.

New trial ordered.

Solicitors for the appellant: *Donaldson & Burkinshaw.*

SONG KIM PUAH v. LIM HOE CHYE

[O. C. J. (Brown J.) January 28, 1953]

[Singapore—Suit No. 326 of 1951]

Landlord and tenant—Surrender of tenancy—Verbal agreement—Absence of act inconsistent with the continuance of tenancy—Grant of licence to former tenant.

Costs—Issue which could have been tried in District Court raised in High Court—Proper order as to costs.

The defendant in this case, by an oral agreement in 1942, granted to the plaintiff a month-to-month tenancy of premises in Geylang Road. In 1951 the plaintiff agreed verbally to quit the premises if defendant's wife would withdraw criminal proceedings against plaintiff's son-in-law. The plaintiff however continued to occupy the premises and the defendant by acts of annoyance such as cutting off the electricity endeavoured to force him to leave. The rent continued to be paid as before. The plaintiff claimed, *inter alia*, a declaration that he was the tenant of the defendant. The defendant replied that the plaintiff had surrendered his tenancy in 1951 and thereafter stayed on as a licensee.

Held: in the absence of writing, and of any evidence of some act which was inconsistent with the continuance of the tenancy, verbal agreement to leave does not constitute delivering up of possession.

The issue of possession which could have been tried in the District Court was raised by the plaintiff in the High Court. This issue might never have been the subject of litigation. The question of whether the plaintiff was a tenant had been raised in the correspondence, and his claim for a declaration had been contested in the High Court. In a letter written when negotiations for a settlement were going on, the plaintiff's solicitors suggested to the defendant's solicitors that it would be open to them to remit the proceedings to the District Court for the trial of the possession issue and that the costs so far incurred in the High Court should follow the event in the District Court.

Held: the proper order was that he should have the costs of the possession issue on the District Court scale.

Cases referred to:—

(1) *Oastler v. Henderson* (1877) 46 L.J. Q.B. 607.

(2) *Foster v. Robinson* (1950) 2 All E.R. 342.

SUIT for a declaration in tenancy.

N. L. Macassey for the plaintiff.

L. A. J. Smith for the defendant.

Cur. Adv. Vult.

Brown J.:—Apart from the question of costs, the sole remaining issue in this case is whether the plaintiff is still the defendant's tenant or whether he surrendered his tenancy outside the Fourth Police Court on 18th October, 1950, and thereafter stayed on as a licensee. I accept the evidence of Mr. Tsan, who on that day was acting on behalf of the defendant's wife as complainant in the assault proceedings. He says that he agreed to withdraw the charge if Song Kim Pua, the present plaintiff, would give his client, the present defendant's wife, notice that he would quit the premises at once.

"Thereupon Song Kim Pua give his notice to the lady and her husband then and there".

The question is whether that operated as a surrender of the tenancy. Mr. Smith, on behalf of the defendant, contends that what occurred on that

occasion was more than an agreement to surrender and that there was a delivery up of possession. He says that the plaintiff is estopped from asserting that the tenancy still subsists.

Now I think it is clear from the authorities that in the absence of writing the mere agreement of the parties to substitute a licence for the tenancy and to allow the plaintiff to stay on as a licensee until he was able to remove to the house which Mr. Baey Kim Swee assured everybody would be ready in a few days would not of itself suffice to produce a surrender by operation of law. There must be some act done by somebody in consequence of the agreement which is inconsistent with the continuance of the tenancy. (*Oastler v. Henderson*⁽¹⁾). In *Foster v. Robinson*⁽²⁾ it was verbally agreed between the tenant and the landlord that the tenant could continue to live in the cottage rent free for the rest of his life. Thereafter rent was neither demanded nor tendered. Mr. Smith placed reliance on the following passage from the judgment of the Master of the Rolls at the bottom of page 348:—

"I think it amounts to this, that the determination of the former tenancy was equivalent to delivery up of possession under that tenancy and a resumption of possession under the new transaction immediately afterwards."

But in that case there was the fact that no rent was paid for four years. Superadded to the agreement was the non-payment of rent, which was inconsistent with the continuance of the tenancy.

In this case it seems to me that not only is there nothing which is inconsistent with the continuance of the tenancy, but that everything which has happened is consistent with it. The rent continued to be paid as before. And there is evidence that up to the start of these proceedings what has been described as a "war of nerves" was going on, in which the defendant's wife, by acts of annoyance such as cutting off the electricity (which she has now given an undertaking not to continue) endeavoured to force the plaintiff to leave. What was the point of it if the plaintiff was a mere licensee unprotected by the Rent Ordinance? But these matters would not be relevant if Mr. Smith is correct in his contention that the plaintiff delivered up possession outside the Fourth Police Court.

Mr. Smith urged upon me another passage from the judgment of the Master of the Rolls in *Foster v. Robinson*⁽²⁾ at the top of the page of 348, where he puts a hypothetical agreement between a landlord and tenant and goes on to say:—

"If all that were given effect to by a carefully drawn agreement, it seems to me difficult to suppose that the Court would have to say: 'We cannot pay the slightest regard to it'."

In the same way I should pay regard to this verbal agreement (which I find as a fact, on Mr. Tsan's evidence, that the parties made on 18th October, 1950), if it had been given effect to in a written document; because that would have complied with section 3 of the Statute of Frauds. But in the absence of writing, and in the absence of any evidence of some act which was inconsistent with the continuance of the tenancy, I cannot accept the argument that in verbally agreeing to leave the plaintiff was making some notional delivery up of possession, which was analogous to the non-payment of rent in *Foster v. Robinson*⁽²⁾. Such an argument seems to me to ignore such authorities as *Oastler v. Henderson*⁽¹⁾ and to be calculated to lead to results which the Rent Ordinance is designed to prevent.

I hold that the plaintiff is entitled to the declaration asked for in item 3 of his claim.

I now come to the question of costs. A day and a half has been taken up in this Court by the possession issue. As the plaintiff was asking for an injunction it was necessary for him to bring this case in the High Court. But the issue of possession could have been tried in the District Court. And the proper party to raise the issue, if he thought fit, was the defendant. The plaintiff was in possession. In raising the issue in this Court he has increased the costs in these proceedings by raising an issue which might never have been the subject of litigation. But the question of whether the plaintiff was a tenant had been raised in the correspondence, and his claim for a declaration has been contested here. Also in a letter dated 9th December, written when negotiations for a settlement were going on, the plaintiff's solicitors suggested to the defendant's solicitors that it would be open to them to remit these proceedings to the District Court for the trial of the possession issue and that the costs so far incurred in the High Court should follow the event in the District Court. In all the circumstances I think the proper order is that he should have the costs of the possession issue on the District Court scale.

Order accordingly.

Solicitors: *Battenberg & Talma; Donaldson & Burkinshaw.*

ABDUL AZIZ BIN HAJI PUTEH v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) August 26, 1954]

[Penang — Criminal Appeal No. 26 of 1954]

Road Traffic — Motor Vehicles (Driving Offences)
Proclamation, s. 12(2) — Statement made under —